

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 08-0730 WHA

Plaintiff,

v.

**ORDER DENYING DEFENDANT
FLORES' MOTION RE TRIAL
GROUPING WITH DEFENDANT
MANUEL FRANCO**

MORIS FLORES, *et al.*

Defendants.

Defendant Moris Flores moves to be severed from the April 4 trial and grouped in the same trial as defendant Manuel Franco (Dkt. No. 3386). Specifically, defendant Flores asserts that he must proceed to trial with defendant Franco because defendant Franco may provide testimony exculpating defendant Flores. For the reasons stated herein, the motion is **DENIED**.

As an initial matter, the motion is untimely. Defense motions to sever were due by December 10, the motions were heard on January 10, and an order on these motions has long since been entered (Dkt. Nos. 2513, 3135, 3395). Defendant Flores' motion to sever made absolutely no mention of his desire to be grouped for trial with defendant Franco and defense counsel failed to make any oral request for such grouping even though: (1) the government agreed in its response to the severance motions that severance of defendant Franco was warranted due to possible *Bruton* problems; and (2) the undersigned specified at the January 10 hearing that it was very likely defendant Franco would be severed (Tr. 67, 68, 71; Dkt. No. 2808).

1 Regardless, the instant motion fails on the merits. In order to obtain a severance based
2 on an allegation that a codefendant will provide exculpatory testimony after severance, the
3 defendant must show that he will call the codefendant to testify and the testimony will be
4 favorable to the defendant. *United States v. Castro*, 887 F.2d 988, 998 (9th Cir. 1989) (citation
5 omitted). The testimony must be *substantially* exculpatory and the defendant must establish a
6 reasonable probability that the codefendant will offer the exculpatory testimony at the
7 defendant's trial. *United States v. Mariscal*, 939 F.2d 884, 886 (9th Cir. 1991); *United States v.*
8 *Kaplan*, 554 F.2d 958, 966–67 (9th Cir. 1977).

9 Defendant Flores' motion does not provide any detail regarding what supposedly
10 exculpatory testimony defendant Franco may offer. The motion simply makes the general
11 assertion that defendant Franco "used his position of considerable influence" over defendant
12 Flores to induce him to join and participate in the charged conspiracy (Br. 2). This is not
13 enough. Defendant Flores is in a position to offer examples of how he was induced or
14 entrapped, yet his motion does not offer any such examples nor any evidence in support.

15 Similarly, defendant Flores has failed to proffer any basis to believe that defendant
16 Franco would actually testify and offer substantially exculpatory testimony as to defendant
17 Flores. Sheer conjecture that defendant Franco may testify about unspecified matters at his
18 criminal trial is inadequate to establishing a "reasonable probability" that defendant Franco will
19 in fact offer exculpatory testimony if the trials are grouped together. Indeed, defendant Flores
20 himself stated that he is willing to waive any *Bruton* errors that may inure if defendant Franco
21 fails to testify at a joint trial with defendant Flores — in effect acknowledging the very real
22 possibility that defendant Franco may not testify at all (Reply 1).

23
24 **IT IS SO ORDERED.**

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26 Dated: March 7, 2011

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE